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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-691

AMERICAN TRIAL LAWYERS ASSOCIATION, NEW JERSEY BRANCH, *et al.*, PHILIP G. AUERBACH, *et al.*,

Appellants,

v.

NEW JERSEY SUPREME COURT,

Appellees.

On Appeal From the United States District Court for the District of New Jersey

JURISDICTIONAL STATEMENT

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MERICAN TRIAL LAWYERS ASSOCIATION, NEW JERSEY BRANCH, *et al.*, PHILIP G. AUERBACH, *et al.*,

Appellants,

v.

NEW JERSEY SUPREME COURT,

*Appellees.**

On Appeal From the United States District Court for the District of New Jersey

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United ates District Court for the District of New Jersey, en-

* These consolidated cases are styled, in full, as follows: *Ameri- n Trial Lawyers Association, New Jersey Branch, Trial Lawyers ssociation of Middlesex County, Middlesex County Bar Associa- n, Hudson County Bar Association, Monmouth County Bar As- ciation, Herbert E. Greenstone and Morris Brown,* individually, d as class representatives of the members of each of the plain- f organizations *v. New Jersey Supreme Court,* and *Philip G. uerbach, Bernard F. Conway,* and *Trial Attorneys of New Jersey,* Corporation of the State of New Jersey, *v. The Chief Justice and e Associate Justices of the New Jersey Supreme Court.*

tered on June 21, 1972, dismissing actions for preliminary and permanent injunctions against enforcement of a Rule promulgated by the New Jersey Supreme Court, and from the denial on September 6, 1972 of a timely motion to alter or amend the judgment of dismissal. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal, and that a substantial question is presented.

Opinion Below

The opinion of the United States District Court for the District of New Jersey is not yet reported. It is attached hereto in Appendix A.

Jurisdiction

The amended complaints in these consolidated class actions challenged Rule 1:21-7(c) of the Supreme Court of New Jersey. Rule 1:21-7(c) establishes a schedule of maximum contingent fee percentages applicable to tort litigation conducted by members of the New Jersey bar, whether in state or federal courts. The amended complaints challenged the substance of the Rule and the manner of its enactment as violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States on various grounds. Questions under the Contract and Supremacy Clauses were also presented, and violation of the New Jersey Constitution was alleged as well. Jurisdiction was rested on 28 U.S.C. § 1343(3), see *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972), and 28 U.S.C. § 1331. Preliminary and permanent injunctions were prayed for.

Over appellant's objection, and after argument had before District Judge Barlow on jurisdictional issues, including the issue of substantiality of the questions presented, a three-judge district court was convened. Following a hearing on appellees' motion "to dismiss the complaint for lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted," the three-judge court, on June 21, 1972, entered an order granting defendant's motion to dismiss. The accompanying opinion invoked the abstention doctrine, and added that the decision to grant the motion to dismiss rendered "plaintiffs' motions moot." Appellants made a timely motion under Rule 59(e), Federal Rules of Civil Procedure, to alter or amend the jugment by substituting a stay for the order of dismissal or amending the order to make clear that the dismissal was without prejudice. This motion was denied on September 6, 1972. A notice of appeal to this Court was filed in the District Court on October 2, 1972. See *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177 (1944); *Leishman* v. *Associated Electric Co.*, 318 U.S. 203 (1943).

The jurisdiction of this Court to review the decision of the court below by direct appeal is conferred by 28 U.S.C § 1253 and 28 U.S.C. § 2101(b). If the judgment of the court below, which was a judgment granting defendants motion to dismiss the complaint for lack of jurisdiction and failure to state a claim upon which relief can be granted, is viewed as a dismissal with prejudice for lack of jurisdiction, then the jurisdiction of this Court to hear the direct appeal is sustained by *Doud* v. *Hodge*, 350 U.S. 485 (1956). In *Doud*, as in the instant case, the opinion of the three-judge court rested the judgment of dismissal solely on the abstention doctrine, without in any way purporting to pass on the merits. See *Doud* v. *Hodge*, 127 F. Supp.

853 (N.D. Ill. 1955).* If the judgment of the court below is viewed as a dismissal without prejudice, more nearly conforming to approved practice in abstention cases, then the juridiction of this Court to hear the direct appeal is sustained by *Lake Carriers' Assn.* v. *MacMullan*, 406 U.S. 498 (1972); and *Zwickler* v. *Koota*, 389 U.S. 241 (1967). In the *Lake Carriers' Assn.* case, the dismissal in the court below was "without prejudice to the plaintiffs to institute other appropriate judicial proceedings." *Lake Carriers' Assn.* v. *MacMullan*, 336 F. Supp. 248, 255 (E.D. Mich. 1971). In *Zwickler* v. *Koota*, the opinion of the three-judge district court, in ordering dismissal, noted that should circumstances arise "which would not justify further abstention, the parties, of course, may seek appropriate relief in the federal courts." *Zwickler* v. *Koota*, 261 F. Supp. 985, 993 (E.D.N.Y. 1966).

Cases in which no appeal was allowed because a three-judge court ordered dismissal on grounds other than abstention and dissolved itself have no bearing on the instant case. Thus in *Wilson* v. *City of Port Lavaca*, 391 U.S. 352 (1968), the three-judge court held that plaintiff's claim was not "one which must be heard by a three-judge court." The case then proceeded to adjudication before a single judge. In *Mengelkoch* v. *Industrial Welfare Commission*, 393 U.S. 83 (1968), a three-judge court dissolved itself for the same reason, and again the case went to a single judge. See also *Kadans* v. *Collins*, 404 U.S. 1007 (1972). In *Rosado* v. *Wyman*, 304 F. Supp. 1354 (E.D. N.Y.), *appeal dismissed*, 395 U.S. 826 (1969), the three-judge court dissolved itself on the ground that the chal-

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* After the remand, *Doud* v. *Hodge* returned to this Court for review of the merits, *sub. nom. Morey* v. *Doud*, 354 U.S. 457 (1957).

lenge to a statute which had since been amended was now moot, and that any challenge to the statute as amended lacked ripeness.* Nor is there any relevance for the instant case in decisions holding that no direct appeal will lie from an interlocutory order, such as denial of a motion for summary judgment, refusing to grant a permanent rather than a preliminary injunction, *Goldstein* v. *Cox*, 396 U.S. 471 (1970), or from the grant or denial of declaratory rather than injunctive relief. *Rockefeller* v. *Catholic Medical Center of Brooklyn and Queens, Inc.*, 397 U.S. 829 (1970), see 9 MOORE'S FEDERAL PRACTICE 80, n. 50 (2d ed. 1972); *Mitchell v. Donovan*, 398 U.S. 427 (1970); and see *Gunn* v. *University Committee to End the War in Viet Nam*, 399 U.S. 383 (1970); *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47, 48 (1971).

The cases discussed in the immediately preceding paragraph rest on considerations of their own, which are not applicable when the question, as in the instant case, is whether there can be a direct appeal to this Court from an order grounded in the abstention doctrine. Were it otherwise, one would have to take it that the cases just referred to tacitly overruled the decisions on appealability in *Doud* v. *Hodge*, *supra*, and *Zwickler* v. *Koota*, *supra*, and were themselves overruled, equally tacitly, by the decision on appealability in *Lake Carriers' Assn.* v. *MacMullan*, *supra*. A direct appeal lies to this Court, therefore, from the judgment of dismissal in the three-judge court below in the instant case.

Appellants continue to entertain doubts that this was properly a case to be heard by a three-judge court under 28 U.S.C. § 2281, and against the event that their doubts

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* For further proceedings in this case see, *Rosado* v. *Wyman*, 414 F. 2d 170 (2d Cir. 1969), *reversed*, 397 U.S. 397 (1970).

should turn out to be well-founded, have simultaneously filed notice of appeal to the Court of Appeals for the Third Circuit and docketed their appeal in that court. The problems of the applicability of Section 2281 and of the disposition of this case should the Court conclude that a three-judge court was improperly convened are discussed in a later section of this Jurisdictional Statement.

Question Presented

Whether a federal district court, having invoked the doctrine of *Reetz* v. *Bozanich*, 397 U.S. 82 (1970), and abstained pending adjudication of issues of state law in the state courts, is authorized to enter a judgment of dismissal rather than a stay, and to decline to alter or amend the judgment of dismissal so as to indicate that it is without prejudice to resumption of the litigation in the district court, if necessary, by parties who initially exercised their right to elect that federal forum for adjudication of their federal claims.

Statute Involved

No statute is involved, but Rule 1:21-7 of the Supreme Court of New Jersey, which is attached hereto as Appendix B.

Statement

On December 21, 1971, the Supreme Court of New Jersey announced adoption of Rule 1:21-7, to be effective January 31, 1972. The court had given notice of a proposed rule limiting contingent fees some six months earlier, and had invited submission of written comments by the Bar. Requests were made to present objections orally,

and the court thereupon scheduled, and on November 6, 1971 held, a session to hear objections orally on this and other proposed rules. See 94 *New Jersey Law Journal* 761, 771, 897 (Aug. 19, Sept. 30, 1971).

Rule 1:21-7 establishes a graduated schedule of maximum contingent fees beginning with an allowance of fifty per cent of the first $1,000 recovered, and dropping to twenty per cent at $50,000 and ten per cent at $100,000. The Rule is applicable to "any matter where a client's claim for damages is based upon the alleged tortious conduct of another, including products liability claims, and the client is not a subrogee . . . ." It is retroactve.* And it applies to cases in federal courts.**

Complaints were filed in this case on January 11 and January 20, 1972, and following the filing of amended com-

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* On April 13, 1972, the Supreme Court of New Jersey authorized publication of the following clarification, in the form of a question and answer: "Do the limits set forth in R. 1:21-7(c) apply to contigent fee arrangements entered into prior to January 31, 1972 (the effective date of the rule) but not completely performed by that date? Yes. The Supreme Court, however, expresses no view as to those arrangements fully performed before that date." 95 *New Jersey Law Journal* 341 (April 13, 1972).

** On April 13, 1972 the Supreme Court of New Jersey authorized publication of the following clarification, in the form of a question and answer: "Do the limits set forth in R. 1:21-7(c) apply to cases in federal courts? Yes. The Supreme Court considers that they apply to any contingent fee arrangement in a tort matter entered into by a New Jersey attorney, without regard to the court in which an action may subsequently be filed, and to any participation by a New Jersey attorney in a contingent fee arrangement entered into outside the State of New Jersey with respect to litigation in this State. This is not intended to deny the authority of the Federal Courts to apply a different standard to implement some other federal policy." 95 *New Jersey Law Journal* 341 (April 13, 1972).

plaints, the actions were consolidated by order of the district court on March 10, 1972. Plaintiffs, appellants here, are individual members of the New Jersey Bar specializing extensively in trial work, including tort cases, and unincorporated associations and non-profit corporations whose members are members of the New Jersey Bar specializing in trial work, including tort cases, and whose objects are the advancement of the public interest, of the professional interests of their members, of the interests of litigants, and of the interests of the Bench and Bar of New Jersey at large. Individual plaintiff-appellants, also suing as class representatives, alleged that they were injured in that their liberty to practice their profession was abridged by Rule 1:21-7, and in that the Rule would cause them to forfeit more than $10,000 each in fees in the reasonably near future. Injuries to, and derivative from those to their members, were alleged by the plaintiff associations and non-profit corporations, as class representatives as well as in their own right. The jurisdiction of the district court was invoked under 28 U.S.C. § 1343(3), and 28 U.S.C. § 1331. The amended complaints did not ask for the convening of a three-judge court.

Plaintiff-appellants alleged that Rule 1:21-7, both in its substance and in the manner of its enactment, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States; that it violates the Contract Clause of Article I, Section 10 of the Constitution of the United States, particularly in its retroactive application to contingent fee contracts entered into prior to its effective date; and that it violates the Supremacy Clause of Article V of the Constitution of the United States in its application to causes of action arising under federal statutes. Preliminary and permanent injunctions were prayed for.

Defendant-appellees moved to dismiss the complaint for lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted, and argument was had before District Judge Barlow on the questions whether the case called for convening a three-judge court, and whether the questions presented were substantial. Plaintiff-appellants contended that the questions presented are substantial, but that the convening of a three-judge court was not called for because 28 U.S.C. § 2281 is inapplicable. Defendant-appellees argued that the questions presented lack substance, but that if they are to be adjudicated in a federal court, that court has to consist of three judges.

On May 2, 1972, Chief Judge Seitz convened a three-judge court. After hearing argument, that court on June 21, 1972, granted defendants' motion to dismiss. The relationship between the parties, said the court, "is an extremely delicate one." It was appropriate, therefore, "before attempting any direct federal intervention at the outset, first to permit the State courts to process the dispute." At this point the court referred to *Reetz* v. *Bozanich*, 397 US. 82 (1970), and added: "As was true in *Reetz* the initial issue is whether the state constitution authorized the enactment challenged." Then the court below quoted the passage, also quoted in *Reetz*, 397 U.S. at 85, from *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U.S. 639, 640-41 (1959), where this Court noted that in situations of some delicacy, it was proper for "unsettled questions of state law" to be decided in state tribunals "preliminary to a federal court's consideration of the underlying federal constitutional questions. . . ."

Plaintiff-appellants thereupon, on June 28, 1972, filed a timely motion under Rule 59(e), Federal Rules of Civil

Procedure, to alter or amend the judgment of dismissal by either: "A) Retaining jurisdiction, but staying proceedings in this Court pending determination of the issues of state law in the courts of New Jersey, or until efforts to obtain such a determination have been exhausted; or B) Ordering that the dismissal be without prejudice, so that the suits for determination of the federal constitutional issues may be reinstituted after exhausting state recourse with respect to state law issues." This motion was denied without opinion on September 6, 1972.

In the meantime, on July 21, 1972, plaintiff-appellants filed an appeal in lieu of prerogative writs in the New Jersey Superior Court Appellate Division seeking adjudication of the issue of state law singled out in the opinion of the three-judge court. Plaintiff-appellants' reason for instituting an action in the New Jersey courts was that, in the interest of obtaining the speediest possible resolution of this controversy, plaintiff-appellants did not intend to, and do not now, challenge application in this case of the abstention doctrine of *Reetz* v. *Bozanich, supra.* It was appellants' expectation that the motion to amend or alter the district court's judgment of dismissal would be granted.

In accordance with the procedure prescribed in *England* v. *Louisiana Board of Medical Examiners,* 375 U.S. 411 (1964), appellants in their appeal in lieu of prerogative writs, as amended,* have informed the state courts of their

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* The amended appeal, in addition to contending that no provision of the New Jersey Constitution or of any other law of New Jersey authorized the New Jersey Supreme Court to promulgate Rule 1:21-7(c), raises other claims under the New Jersey Constitution as well, and names as parties-plaintiff only the unincorporated associations and non-profit corporations who are parties in the instant case.

federal claims, and have presented the full case, while seeking adjudication only of the issues of state law, and explicitly reserving the right to return for full disposition of the case to the federal district court. In the interest, again, of achieving the speediest and most economical resolution of this controversy, appellants intend to press the action in the New Jersey courts with a view to obtaining adjudication there of the issues of state law, and in the expectation that this Court will make clear their right to return to the federal district court for ultimate disposition of the full case, including their federal claims.

Defendant-appellees have filed an answer in the Superior Court of New Jersey Appellate Division to plaintiff-appellants' appeal in lieu of prerogative writs, and have appended to their answer a counter-claim for declaratory judgment. The counterclaim urges that the Superior Court of New Jersey Appellate Division consider plaintiff-appellants' federal claims made in the federal district court, if in the court's judgment this is appropriate in light of an overall assessment of the controversy. Plaintiff-appellants are resisting this counter-claim. Having presented their federal claims, as prescribed in *England* v. *Louisiana Board of Medical Examiners, supra,* plaintiff-appellants do not propose to press them, but rather to seek adjudication only of issues of state law, and to reserve their right to return to the federal forum in which they elected to bring suit.

The Question is Substantial

The ground of decision in the court below was the doctrine of abstention as developed and refined by this Court in cases from *Railroad Commission* v. *Pullman Co.,* 312 U.S. 496 (1941), to *Reetz* v. *Bozanich, supra,* and *Lake*

Carriers' Assn. v. *MacMullan, supra.* A dismissal with prejudice in a *Pullman-Reetz-MacMullan* abstention case is plain error. That is the square holding of *Doud* v. *Hodge, supra.* It is the holding also of *Lake Carriers' Assn.* v. *MacMullan, supra.* In that case, as noted earlier, the district court dismissed the complaint "without prejudice to plaintiffs to institute other appropriate judicial proceedings." *Lake Carriers' Assn.* v. *MacMullan, supra,* 336 F. Supp. at 255. This Court, having held that the district court properly abstained, nevertheless vacated the judgment of dismissal, although it was without prejudice, and remanded with directions to retain jurisdiction pending appropriate proceedings in the state courts. 406 U.S. at 512-13. *A fortiori* a judgment of dismissal with prejudice would have been vacated.

The reason is not far to seek. "[W]e have on several occasions explicitly recognized," this Court has said, quoting from *Harrison* v. *NAACP,* 360 U.S. 167, 177 (1959), "that abstention 'does not, of course, involve the abdication of jurisdiction, but only the postponement of its exercise.'" *England* v. *Louisiana State Board of Medical Examiners, supra,* 375 U.S. at 416, and see n. 7. The possibility of ultimate review in the Supreme Court of the United States, the Court went on, is no adequate substitute for litigation in a district court. Hence the possibility of such ultimate review "may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts." *England* v. *Louisiana State Board of Medical Examiners, supra,* 375 U.S. at 417. A dismissal with prejudice following abstention does relegate the moving party to adjudication in the state courts, holding out the possibility of ultimate review in the Supreme Court as the only means of access to any federal forum. It does amount to abdication of federal

jurisdiction rather than postponement of its exercise. And for these reasons it is impermissible.

The better practice in abstention cases, this Court noted in *Zwickler* v. *Koota, supra,* 389 U.S. at 244, n. 4, is to stay proceedings and retain jurisdiction, rather than to order dismissal of any sort. This is the practice followed by this Court. See, in addition to cases cited earlier, *Fornaris* v. *Ridge Tool Co.,* 400 U.S. 41 (1970). And it is the prevalent practice in lower courts. See, *e.g., Harris* v. *Samuels,* 440 F.2d 748 (5th Cir.), *cert. denied,* 404 U.S. 832 (1971); *Coleman* v. *Ginsberg,* 428 F.2d 767 (2d Cir. 1970).

The Court went on to observe in *Zwickler* v. *Koota, supra,* 389 U.S. at 244, n. 4, that "other courts have also ordered dismissal." Some courts have done so while specifying very carefully that the dismissal is without prejudice. See *Romero* v. *Coldwell,* 455 F.2d 1163 (5th Cir. 1972); *Barrett* v. *Atlantic Richfield Co.,* 444 F.2d 38, 44 *et seq.* (5th Cir. 1971). Such dismissals without prejudice, as Circuit Judge Clark explained in *Hill* v. *City of El Paso,* 437 F.2d 352, 357 (5th Cir. 1971), hardly differ from retention of jurisdiction, because they also do not require a party to litigate his federal claims in the state courts. Rather, like a stay, they enable the moving party to follow the procedure prescribed in *England* v. *Louisiana State Board of Medical Examiners, supra,* and retain his right to return to the federal district court for litigation of his federal claims.

Dismissals which lack the notation that they are without prejudice are characteristic of another type of decision altogether, also involving use of the term "abstention," but in a very different sense. In *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943); *Alabama Public Service Commission* v. *Southern Railway Co.,* 341 U.S. 341, 946 (1951), and

a strictly limited line of like cases, the decision was, not to postpone, but to abdicate the exercise of federal jurisdiction in a federal trial court, and to substitute, against a party's wishes, the possibility of ultimate review in the Supreme Court of the United States for the right to litigate a federal claim fully in a federal forum. This is total abstention, quite another thing than *Pullman-Reetz-MacMullan* abstention, and of course the proper disposition then is outright dismissal, with prejudice, of the suit in the federal district court. *Local 333B, United Marine Division, International Longshoremen's Assn.* v. *Battle,* 101 F. Supp. 650 (E.D.Va.), *affirmed,* 342 U.S. 880 (1951), cited by this Court as illustrative of the practice of dismissing rather than staying, *Zwickler* v. *Koota, supra,* 389 U.S. at 244, n. 4, was such a case. So probably was *Stainback* v. *Mo Hock Ke Lok Po,* 336 U.S. 368 (1949), also cited by this Court as another illustration, although Professor Wright's view is that *Stainback* "can only be regarded as a sport." See C. WRIGHT, FEDERAL COURTS 198, n. 19 (2d ed. 1970). *Burford* is cited in *Stainback. Pullman* is not. 336 U.S. at 383, n. 29. *Koehler* v. *Ogilvie,* 53 F.R.D. 98 (D.C.N.D. Ill. 1971), *affirmed,* 405 U.S. 906 (1972), another of the exceedingly rare cases in which this Court approved an outright dismissal, was also a decision resting on the authority of *Burford* v. *Sun Oil Co., supra;* and *Alabama Public Service Commission* v. *Southern Railway Co., supra.*

Rightly or wrongly, cf. *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971), the court below in the instant case applied the *Pullman-Reetz-MacMullan* abstention doctrine. That and nothing else. And that is the only ground on which abstention could possibly have been rested in this case. Before saying that it was appropriate "first to permit the state courts to process the dispute"—the language

Reetz abstention, followed immediately by a citation *Reetz* v. *Bozanich, supra*—the court below did mention the relationship between the parties, namely, the e's highest court and members of the Bar, "is an exely delicate one." But the delicacy of the relationship ween the parties is in itself no ground for any sort of ention, let alone the *Burford* sort. There was at least nuch delicacy involved, for example, in *Law Students earch Council* v. *Wadmond,* 401 U.S. 154 (1971).

is subject to serious question whether *Burford* v. *Sun Co., supra; Alabama Public Service Commission* v. *hern Railway Co., supra,* and the very few decisions them retain any vitality beyond their own immediate ıal contexts. Cf. *County of Allegheny* v. *Frank huda Co.,* 360 U.S. 185 (1959); and see 1A Moore's ERAL PRACTICE, 2101-2114 (1965). They can in any event none in the context of the instant case. In *Burford,* application of a complex state program of intricate lation of the oil industry was attacked. This Court ed the confusion, delay and misunderstanding that ıt follow upon multiple review by many courts, state federal, of the same sort of general issues in numersuits attacking particular orders made under the state ram. The Court, therefore, wished to centralize adcation in the highest state court and in itself. The *ama Public Service Commission* case also involved an mpt at episodic intervention in a continuous course of e administration. Again, *Koehler* v. *Ogilvie, supra,* an attack on "the manner in which the judges of the uit Courts of the State of Illinois administer the die laws." 53 F.R.D. at 101-102.

the instant case, the court below was confronted with ttack on the administration of Rule 1:21-7. It was not d to pass on one of many and varied applications of

the Rule, or on the manner in which, in the aggregate, the Rule has been or might be administered. The court was asked to pass rather on the federal constitutional claim that the entire Rule is unconstitutional. No episodic involvement by the court in the minutiae of the daily administration of an otherwise concededly constitutional scheme of state regulation was here called for. This case could not be more distant from *Burford* and like decisions. If this case is *Burford*, then so are all state cases in federal courts.*

Given its reliance on *Reetz* v. *Bozanich, supra,* which constitutes the only possible ground for its decision, the court below may have intended the judgment of dismissal to be understood as being without prejudice. Yet the court denied a motion to amend the judgment so as to make such an understanding explicit, as is the practice in other courts which sometimes use a dismissal rather than a stay in this sort of abstention case. A dismissal without more is, of course, generally understood to be a dismissal with prejudice. The position in which the court below has left appellants is in any event one that disables them from making a rational choice to ensure preservation of their federal rights. Appellants submit that to have placed them in this position was an abuse of discretion on the part of the court below.

If appellants act on the assumption that the dismissal was intended to be without prejudice to the resumption of the litigation in the district court following decision of issues of state law in the state courts, then they will pro-

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* It hardly requires statement that *Younger* v. *Harris,* 401 U. S. 37 (1971), and the cases decided with it have no bearing on the instant case, and that neither does 28 U.S.C. § 2283, see *Roudebush* v. *Hartke,* 405 U. S. 15, 20-23 (1972).

ceed in the manner indicated in *England* v. *Louisiana Board of Medical Examiners, supra,* seek adjudication only of issues of state law in the state courts, thus foreclosing the possibility of review in this Court, and ultimately return to the district court, if necessary. This is the course appellants have followed. Should they later discover that their assumption was wrong, that the dismissal was intended to be with prejudice, and that the district court will not hear them again, they will have lost any possibility of being heard in any federal forum, including this Court on review. To assume, on the other hand, that the dismissal was with prejudice is gratuitously to acquiesce in the abandonment rather than postponement of federal jurisdiction at the trial level, and in deprivation of the right to elect adjudication of federal claims in a federal district court. For on this assumption, in order to preserve at least the possibility of review in this Court, appellants would have to seek adjudication of their federal claim in the New Jersey courts; and such adjudication would be *res judicata.*

The abstention doctrine notoriously leads to complexities. It exacts a price. But as applied by the court below, it amounts to a snare, for the wary as much as the unwary. The creation of such a snare cannot be what is intended by abstention. It cannot be regarded as an acceptable price for the benefits derived from the abstention doctrine. And it cannot be within the discretion of a district court.

The Three-Judge Court Issue and the Simultaneous Appeal to the Court of Appeals

Appellants took the position in the court below that 28 U.S.C. § 2281 is "an enactment technical in the strict sense

of the term and to be applied as such." *Phillips* v. *United States,* 312 U.S. 246, 251 (1941). So applied, appellants contended, the statute calls for convening a three-judge court only when a state's legislative policy, as declared either by its legislature or by an administrative body, is put in question. A rule of court, therefore, such as Rule 1:21-7 in this case, is not within the coverage of 28 U.S.C. § 2281. That is evident on the face of the statute, and since the "statute is to be strictly construed," *Board of Regents of the University of Texas System* v. *New Left Education Project,* 404 U.S. 541, 545 (1972), it should be an end of the matter.

The only judicial opinion that appellants have been able to find which concludes that 28 U.S.C. § 2281 may in any circumstances be applicable to a rule of court or any other judicial order is the two-paragraph opinion in *Razos* v. *Drusina,* 440 F. 2d 795 (5th Cir. (1971)* *Razos* concerned a challenge to Texas Rules of Civil Procedure 749 and 750, promulgated by the Texas Supreme Court pursuant to Acts 1939, 46th Leg., Ch. 25, § 1, p. 201, Art. 1731a, *Vernon's Ann. Civ. Stat.* This statute specifically confers on the Supreme Court rule-making power in civil judicial proceedings, including power to override prior procedural statutes, but provides that rules

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* Cf. *Sufflizg* v. *Bondurant,* 339 F. Supp. 257 (D. N. M. 1972) (residency rule of Board of Bar Examiners appointed by Supreme Court of New Mexico held constitutional by three-judge court; no discussion of three-judge court issue); *Potts* v. *Honorable Justices of the Supreme Court of Hawaii,* 332 F. Supp. 1392 (D. Hawaii 1971) (statutory residency requirement for bar admission and implementing rule of Supreme Court of Hawaii declared unconstitutional; three-judge court justified because injunctive relief sought "against a state statute and an order made by an administrative board or commission acting under a state statute," 332 F. Supp. at 1392).

are to become effective only if not disapproved by the legislature, where they must lie on the table for at least sixty days. The court emphasized this aspect of the rule-making authority in Texas. It is thus arguable, appellants contended, that the Texas system was viewed as combining the judicial and the legislative functions, and as at least constructively constituting the Texas Rules of Civil Procedure an act of the Texas legislature. But the situation in the instant case is altogether different. The New Jersey Supreme Court's Rule 1:21-7 is in no sense, however attenuated, an enactment of the New Jersey legislature. It was promulgated pursuant to no enabling act whatever, and neither by lying on the table nor in any other way did it remotely receive the approval, however tacit, of the New Jersey legislature. The holding in *Razos* v. *Drusina, supra,* appellants contended, is therefore not applicable on the facts of the instant case.

Since there was thus no challenge in this case to a statute within the meaning of 28 U.S.C. § 2281, nor any challenge to the validity of any provision of the New Jersey Constitution, but only a challenge to the lawfulness of authority purportedly exercised under it, compare *Phillips* v. *United States, supra,* with *American Federation of Labor* v. *Watson,* 327 U.S. 582 (1946), appellants contended that the instant case was not properly one for a three-judge court.

"To guard against a frustration of review by this Court's refusal to accept jurisdiction," *Stainback* v. *Mo Hock Ke Lok Po, supra,* 336 U.S. at 370, appellants have, as previously noted, filed a notice of appeal to the Court of Appeals for the Third Circuit, and docketed their appeal there. They have also moved before Chief Judge Seitz for an order staying all proceedings in that appeal pending this Court's disposition of the instant appeal. Should this

Court find that it does indeed lack jurisdiction of this appeal because the case should not have been heard by a three-judge court, appellants respectfully submit that, in the circumstances, all considerations of justice to the parties and of the economy of judicial effort counsel disposition of this case on the model of *Turner* v. *City of Memphis*, 369 U.S. 350, 353-354 (1962), and *Stainback* v. *Mo Hock Ke Lok Po, supra*, 336 U.S. at 380-81.

In light of the perfected appeal to the Court of Appeals for the Third Circuit, it is as appropriate here as it was in *Turner* v. *City of Memphis, supra*, 369 U.S. at 353-354, that this Court treat "appellant's jurisdictional statement as a petition for writ of certiorari prior to judgment in the Court of Appeals," under 28 U.S.C. §§ 1254(1), 2101(e). Guidance from this Court is essential if the abstention doctrine is not to operate, as it has in this case, as a trap for litigants from which there is no possible escape short of involuntary abandonment of the right of access to a federal district court. That guidance can best be provided in this case, should the Court conclude that it has no appellate jurisdiction, by treating this jurisdictional statement as a petition for certiorari before judgment in the Court of Appeals, and thus preventing a further drain on the resources and energies of both the litigants and the federal judiciary.

CONCLUSION

For the reasons assigned, appellants respectfully submit that the question presented herein is substantial and merits adjudication by this Court.

Respectfully submitted,

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[APPENDICIES FOLLOW]

APPENDIX A

Opinion of United States District Court

(Filed—June 20, 1972.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION No. 64-72

CIVIL ACTION No. 142-72

AMERICAN TRIAL LAWYERS ASSOCIATION, NEW JERSEY BRANCH and TRIAL LAWYERS OF MIDDLESEX COUNTY

v.

NEW JERSEY SUPREME COURT

PHILIP G. AUERBACH, BERNARD F. CONWAY, and TRIAL ATTORNEYS OF NEW JERSEY, a corporation of the State of New Jersey

v.

THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE NEW JERSEY SUPREME COURT

Before: SEITZ, *Chief Judge*, (Circuit Judge), BARLOW and LACEY, *District Judges*.

Appendix A

PER CURIAM.

This matter comes before us on plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss. The complaints challenge Rule 1:21-7(c), promulgated by the New Jersey Supreme Court effective January 31, 1972. In essence the rule establishes a schedule of maximum contingent fee percentages applicable to tort litigation conducted by New Jersey attorneys, whether in the state or federal courts. With few exceptions the fee percentages are restricted to the following limits:

(1) 50% on the first $1000 recovered;

(2) 40% on the next $2000 recovered;

(3) 33⅓% on the next $47,000 recovered;

(4) 20% on the next $50,000 recovered;

(5) 10% on any amount recovered over $100,000.

Plaintiffs include several state trial attorneys appearing individually and three professional associations representing various groups of such attorneys. Both the individual plaintiffs and the members represented by the plaintiff associations devote substantial time to tort litigation governed by the challenged rule. The theme common to plaintiffs' complaints is that Rule 1:21-7(c) violates the Federal Constitution, in its enactment as well as application. Plaintiffs seek an adjudication of the rule's unconstitutionality and an order permanently enjoining the rule's operation or enforcement.

Essentially the case poses a dispute between a state's to practice law in the state. The relationship between the highest court and those persons authorized by that court

parties thus is an extremely delicate one. Under such circumstances federal courts generally have considered it appropriate, before attempting any direct federal intervention at the outset, first to permit the state courts to process the dispute. Cf. Reetz v. Bozanich, 397 U. S. 82, 85-87 (1970). As was true in *Reetz* the initial issue is whether the state constitution authorized the enactment challenged. Presented with such a situation the Court in *Reetz* concluded that:

> "Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions. . . . That is especially desirable where the questions of state law are enmeshed with federal questions. . . . Here, the state law problems are delicate ones, the resolution of which [are] not without substantial difficulty—certainly for a federal court. . . . In such a case, when the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily."

Id. at 85, quoting City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U. S. 639, 640-41 (1959).

Plaintiffs' primary contention concerns the authority, under Article VI, §2, para. 3 of the New Jersey Constitution, for the state supreme court to promulgate Rule 1:21-7(c). And, in concluding that abstention is the proper course here we realize that plaintiffs must therefore re-

sort to the state court to argue their position. Plaintiffs do not suggest that procedures for raising such a challenge in the state courts are unavailable. Cf. Gair v. Peck, 6 N. Y. 2d 97, 188 N. Y. S. 2d 491 (1959). Rather, they emphasize that by leaving them to the state courts they ultimately must have their cause decided by the same body which took the action they attack. Admittedly, this is so. Nevertheless, we cannot conclude that the state courts will listen with deaf ears to plaintiffs' challenge simply because plaintiffs attack the rulemaking authority of the state supreme court. Cf. Gair v. Peck, supra.

We also acknowledge that a potentially prejudicial delay affecting plaintiffs inheres in our decision to abstain. Such potential by itself, however, cannot justify a decision on the merits when abstention otherwise is appropriate. Cf. Reetz v. Bozanich, supra at 87. In addition, we feel confident that any prejudice possible is significantly minimized by subsection (f) of the challenged rule permitting an individual attorney substantially affected by the immediate continued implementation of Rule 1:21-7(c) to recover fees in excess of those authorized by the announced schedule when the circumstances of his particular case justify additional compensation.

Defendants' motion to dismiss the complant is granted. Our decision as to this motion renders plaintiffs' motions moot.

ORDERED this day of June 1972, that defendants' motion to dismiss the complaint is granted.

COLLINS J. SEITZ

GEORGE H. BARLOW

FREDERICK B. LACEY

APPENDIX B

Rule 1:21-7 of the Supreme Court of New Jersey

1:21-7. Contingent Fees

(a) As used in this rule the term "contingent fee arrangement" means an agreement for legal services of an attorney or attorneys, including any associated or forwarding counsel, under which compensation, contingent in whole or in part upon the successful accomplishment or disposition of the subject matter of the agreement, is to be in an amount which either is fixed or is to be determined under a formula.

(b) An attorney shall not enter into a contingent fee arrangement without first having advised the client of the right and afforded the client an opportunity to retain him under an arrangement whereby he would be compensated on the basis of the reasonable value of his services.

(c) In any matter where a client's claim for damages is based upon the alleged tortious conduct of another, including products liability claims, and the client is not a subrogee, an attorney shall not contract for, charge, or collect a contingent fee in excess of the following limits:

(1) 50% on the first $1000 recovered;

(2) 40% on the next $2000 recovered;

(3) 33⅓% on the next $47,000 recovered;

(4) 20% on the next $50,000 recovered;

(5) 10% on any amount recovered over $100,000; and

(6) where the amount recovered is for the benefit of an infant or incompetent and the matter is settled with-

out trial the foregoing limits shall apply, except that the fee on any amount recovered up to $50,000 shall not exceed 25%.

(d) The permissible fee provided for in paragraph (c) shall be computed on the net sum recovered after deducting disbursements in connection with the institution and prosecution of the claim, whether advanced by the attorney or by the client, including investigation expenses, expenses for expert or other testimony or evidence, the cost of briefs and transcripts on appeal, and any interest included in a judgment pursuant to R. 4:42-11(b); but no deduction need be made for liens, assignments or claims in favor of hospitals or for medical care and treatment by doctors and nurses, or similar items. The permissible fee shall include legal services rendered on any appeal or review proceeding or on any retrial, but this shall not be deemed to require an attorney to take an appeal.

(e) Paragraph (c) of this rule is intended to fix maximum fees and does not preclude an attorney from entering into a contingent fee arrangement providing for, or from charging or collecting a contingent fee below such limits.

(f) If at the conclusion of a matter an attorney considers the fee permitted by paragraph (c) to be inadequate, an application on written notice to the client may be made to the Assignment Judge for the hearing and determination of a reasonable fee in light of all the circumstances. A copy of any such application and of all papers filed in support of or in opposition thereto, together with a copy of the court order fixing the fee shall be filed with the Administrative Office of the courts. This rule shall not preclude the exercise of a client's existing right to a court review of the reasonableness of an attorney's fee.

Appendix B

g) Where the amount of the contingent fee is limited the provisions of paragraph (c) of this rule, the con-ent fee arrangement shall be in writing, signed both he attorney and the client, and a signed duplicate shall given to the client. Upon conclusion of the matter re-ing in a recovery, the attorney shall prepare and fur- the client with a signed closing statement. Such con-ent fee arrangement and closing statement, if any, l be in the form prescribed by the Administrative Di-or of the Courts. To provide information for study poses as to the subject of contingent fees and the op-ion of this rule, copies of all such contingent fees ar-gements entered into between the effective date of this (January 31, 1972) and January 31, 1973, shall, with-0 days of their execution and delivery, be filed with the inistrative Office of the Courts, and copies of any clos- statements on matters covered by such filed contin-t fee arrangements shall likewise be filed, within 10 s of their execution and delivery, with the Administra- Office of the Courts. All such filed contingent fee ar-gements and closing statements and all applications accompanying papers filed pursuant to paragraph (f) his rule shall be confidential and access to or use there-hall be only as authorized by the Supreme Court.

e effective January 31, 1972.

APPENDIX C

Clerk's Docket Entry of Order of September 6, 1972 Denying Plaintiff's Motion to Alter or Amend Judgment

CLERK'S OFFICE
UNITED STATES DISTRICT COURT
for the
DISTRICT OF NEW JERSEY
TRENTON

CIVIL ACTION No. 64-72, 142-72

AMERICAN TRIAL LAWYERS ASSOCIATION, *et al,*

vs.

NEW JERSEY SUPREME COURT

PHILIP G. AUERBACH, *et al.*

vs.

THE CHIEF JUSTICES AND THE ASSOCIATE JUSTICES OF THE N. J. SUPREME COURT

There was entered on the docket on 9-6-72 an order (judgment) denying plaintiff's motion to alter or amend the judgment filed 9-5-72. (Seitz, Barlow & Lacey).

ANGELO W. LOCASCIO,
Clerk

APPENDIX D

Notice of Appeal to the United States Supreme Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(Civil Action No. 64-72)

AMERICAN TRIAL LAWYERS ASSOCIATION,
NEW JERSEY BRANCH, *et al*,

Plaintiffs,

vs.

NEW JERSEY SUPREME COURT,

Defendant.

(Civil Action No. 142-72)

PHILIP G. AUERBACH, *et al*,

Plaintiffs,

vs.

THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE NEW JERSEY SUPREME COURT,

Defendant.

NOTICE is hereby given that each of the plaintiffs in the above consolidated cases, individually and as class representatives, hereby appeal to the Supreme Court of the United States from the Judgment dismissing the said ac-

tions, made by a Three Judge Court, comprised of Chief Judge Seitz of the United States Court of Appeals for the Third Circuit, and District Judges Barlow and Lacey, entered June 21, 1972, and the final order of the same Court denying the plaintiffs' motion to amend the said Judgment, entered September 6, 1972.

This Appeal is taken pursuant to 28 U.S.C. Sec. 1253.

SCHNITZER AND SCHNITZER, ESQS.
Attorneys for the Plaintiffs in
Civil Action No. 64-72
By MORRIS M. SCHNITZER,
A Partner

Dated: October 2, 1972.

WILLIAM O. BARNES, JR., ESQ.
Attorneys for the plaintiffs in
Civil Action No. 142-72.

Of Counsel:

ALEXANDER M. BICKEL, ESQ.

CERTIFICATION OF SERVICE

I, MORRIS M. SCHNITZER, one of the attorneys for the plaintiffs-appellants, and a member of the Bar of the Supreme Court of the United States, hereby certify that on October 2, 1972, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States upon the defendant-respondent, by mailing a copy, in a

duly addressed envelope, postage prepaid, to the attorney of record of the defendant-respondent, namely, Stephen Skillman, Assistant Attorney General of New Jersey, State House Annex, Trenton, New Jersey, 08625.

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SCHNITZER and SCHNITZER, ESQS.
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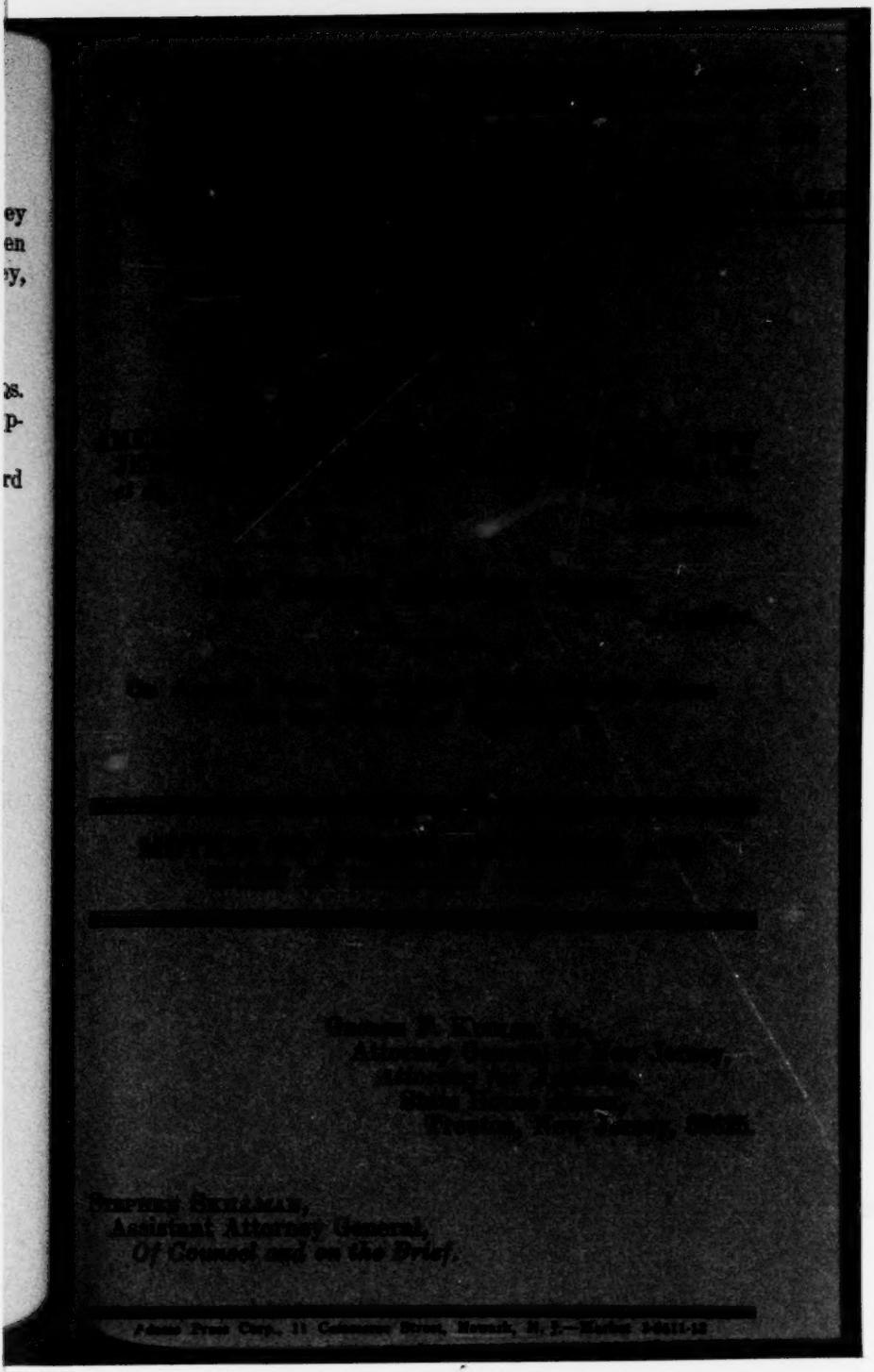

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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 691

AMERICAN TRIAL LAWYERS ASSOCIATION, NEW JERSEY BRANCH, *et al.*, PHILIP G. AUERBACH, *et al.*,

Appellants,

v.

NEW JERSEY SUPREME COURT,

Appellee.

On Appeal From the United States District Court for the District of New Jersey

MOTION TO DISMISS OR AFFIRM

The appellee moves to dismiss the appeal pursuant to Rule 16(1)(a) on the ground that the Court lacks jurisdiction under 28 U.S.C. § 1253; or in the alternative, the appellee moves to affirm the judgment of dismissal of the District Court for the District of New Jersey pursuant to Rule 16(1)(c) on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Questions Presented

1. Is a substantial federal constitutional question which confers jurisdiction on a three-judge court pursuant to 28 U.S.C. § 2281 presented by the adoption of a rule of court regulating contingent fee arrangements in tort litigation?

2. Did the three-judge court abuse its discretion in ordering dismissal on grounds of abstention of an action brought by members of the state bar against the Supreme Court of New Jersey to invalidate a rule of court adopted to regulate the practice of law within the state?

Statement of the Case

The Supreme Court of New Jersey, pursuant to its authority under the New Jersey Constitution* regarding the administration of the courts and the regulation of the practice of law, adopted a rule of court regulating the use of contingent fee arrangements in tort litigation. N.J.R. 1:21-7. The rule requires an attorney, before entering into a contingent fee arrangement, first to afford the client an opportunity to retain him under an arrangement providing for compensation on the basis of the reasonable value of services rendered. N.J.R. 1:21-7(b). The rule further provides that an attorney shall not contract for or collect

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* The pertinent section of the New Jersey Constitution provides:

> "The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted." N. J. Const., Art. 6, § 2, para. 3.

a contingent fee for handling a tort claim which is in excess of:

"(1) 50% on the first $1,000 recovered;

(2) 40% on the next $2,000 recovered;

(3) 33⅓% on the next $47,000 recovered;

(4) 20% on the next $50,000 recovered;

(5) 10% on any amount recovered over $100,000; and

(6) where the amount recovered is for the benefit of an infant or incompetent and the matter is settled without trial the foregoing limits shall apply, except that the fee on any amount recovered up to $50,000 shall not exceed 25%."

N.J.R. 1:21-7(c).

N.J.R. 1:21-7(f) provides that if an attorney considers the fee permitted by paragraph (c) to be inadequate, an application on written notice to the client may be made at the conclusion of the matter to have the Assignment Judge determine a reasonable fee in light of all the circumstances. The court has indicated by administrative directive that a provision reserving the right to proceed under N.J.R. 1:21-7(f) should be included in the contingent fee agreement.

The American Trial Lawyers, New Jersey Branch, et al. (hereinafter American Trial Lawyers) and the Trial Attorneys of New Jersey, et al. (hereinafter Trial Attorneys) brought actions in the United States District Court for New Jersey challenging the validity of N.J.R. 1:21-7(c) on the grounds that the Supreme Court of New Jersey lacks authority under the New Jersey Constitution to

adopt such a rule and that it is violative of various provisions of the United States Constitution. The complaints demanded both preliminary and permanent injunctive relief against the operation of the rule. Recognizing that the court's rule was legislative in nature, the original complaint of the American Trial Lawyers sought the convening of a three-judge court pursuant to 28 U.S.C. § 2281.

The Attorney General of New Jersey, representing the Supreme Court of New Jersey, filed motions to dismiss the complaints for lack of jurisdiction on the grounds that they present no substantial federal claim. *Rosado* v. *Wyman,* 397 U. S. 397 (1970). The brief in support of the motion also agreed with the American Trial Lawyers original contention that the case would fall under § 2281 if a substantial constitutional claim were presented.

The single federal district court judge before whom the motion to dismiss was brought referred the matter to Chief Judge Seitz of the Third Circuit Court of Appeals for the convening of a three-judge court. No formal order denying the motion to dismiss nor opinion thereon was filed. A three-judge court was convened and, after oral argument, the court in a short *per curiam* opinion dismissed the complaint on grounds of abstention. A motion by the plaintiffs to alter or amend the judgment was denied and an appeal was then taken to this Court.

ARGUMENT

POINT I

The Court lacks jurisdiction of the appeal under 28 U.S.C. § 1253, because the appellants' complaints failed to present a substantial federal constitutional question and the three-judge district court was therefore without jurisdiction under 28 U.S.C. § 2281.

The jurisdiction of the Court to hear this appeal is rested upon 28 U.S.C. § 1253, which provides for direct appeal from any order granting or denying an injunction in a civil action required to be heard by a three-judge district court. It is well established that the Court has jurisdiction to hear an appeal pursuant to § 1253 only if the case was in fact required to be heard by a three-judge court. *Bd. of Regents of the University of Texas System* v. *New Left Education Project,* 404 U. S. 541 (1972); *Bailey* v. *Patterson,* 369 U. S. 31 (1962). It is also clear that 28 U.S.C. § 2281 does not confer jurisdiction on a three-judge court if no substantial federal constitutional claim is presented. *Bailey* v. *Patterson, supra; Ex parte Poresky,* 290 U. S. 30 (1933). Therefore, the appellants must demonstrate that the complaints filed in the district court present a substantial federal constitutional claim in order to establish the Court's jurisdiction to hear the appeal. *Bailey* v. *Patterson, supra.*

The complaints set forth a series of federal constitutional claims in "shotgun" form. The appellee contends, as it did before the court below, that none of these claims are substantial. The decision of the single federal district court judge to request the convening of a three-judge court had to be grounded on the conclusion that a sub-

stantial federal constitutional claim was presented. Similarly, as the court stated in *Idlewild Bon Voyage Liquor Corp.* v. *Rohan,* 289 F. 2d 426, 429 (2nd Cir. 1961) *aff'd* 370 U. S. 713 (1962), the decision of the three-judge district court to abstain ". . . [presupposed] that the court [had] jurisdiction to decide the controversy." But neither the single district court judge nor the three-judge panel issued an opinion pointing to any specific constitutional claim which it concluded was substantial. Furthermore, the appellants' jurisdictional statement does not discuss the substantiality of the constitutional claims advanced, even though the jurisdiction of the Court depends on such a showing. It is necessary, therefore, to discuss briefly each one of the claims presented by the appellants to the district court.

The appellants seemed to rely primarily on substantive due process grounds in challenging the contingent fee rule. The rule is an economic regulatory measure, since its purpose is to prevent attorneys from charging contingent fees in excess of what the Supreme Court of New Jersey has determined to be fair. Such measures are presumed to be constitutional unless shown to be inconsistent with some specific constitutional prohibition. *Ferguson* v. *Skrupa,* 372 U. S. 726, 730-731 (1963). Consequently, an economic regulatory measure will not be set aside unless no set of facts can be reasonably conceived to justify it. *McGowan* v. *Maryland,* 366 U. S. 420 (1961). These recognized principles of judicial deference to legislative judgments in the area of economic regulation are reflected in a long line of cases sustaining statutes regulating businesses and profession, including ones which place limitations on prices and fees. See *e.g. Olson* v. *Nebraska,* 313 U. S. 236 (1941) (statute limiting the amount charged by a private employment agency to 10% of cli-

ents' first month's wage); *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U. S. 251 (1931) (statute limiting an insurance agent's commission on a fire policy); *Block* v. *Hirsh*, 256 U. S. 135 (1921) (statute limiting rents in housing shortage); *Griffith* v. *Connecticut*, 218 U. S. 572 (1910) (statute setting maximum interest rates on loans). In fact, the Court has sustained outright prohibitions of commercial enterprises deemed to be inimical to the public interest. See *e.g. Ferguson* v. *Skrupa*, 372 U. S. 726 (1963) (statute making it a misdemeanor for any person to engage in the business of "debt adjusting" except as an incident to the practice of law).

The constitutionality of provisions establishing maximum charges for legal services are governed by these same principles. It is well established that the states, through their judiciaries, have broad power to regulate the practice of law. *Law Students Civil Rights Research Council* v. *Wadmond*, 401 U. S. 154 (1971); *Lathrop* v. *Donohue*, 367 U. S. 820 (1961). This regulatory power may be exercised to limit attorneys' fees, particularly to guard against the dangers inherent in contingent fee arrangements, which have been deemed substantial enough to merit their outright prohibition in other common law countries as well as on the continent. See Taggart, *Are Contingent Fees Ethical Where Client is Able to Pay a Retainer*, 20 Ohio St. L. J. 329, 336 (1959). In recognition of the strong public interest in the fee relationships between attorney and client, the Court has sustained a wide range of provisions adopted to protect clients from being charged excessive fees. *Randolph* v. *U. S.*, 274 F. Supp. 200 (M. D. N. C. 1967), *aff'd* 389 U. S. 570 (1968); *Margolin* v. *U. S.*, 269 U. S. 93 (1925); *Yeiser* v. *Dysart*, 267 U. S. 540 (1925); *Calhoun* v. *Massie*, 253 U. S. 170 (1920). See also *Gair* v. *Peck*, 6 N. Y. 2d 97, 188 N. Y. Sup. 2d 491, 160

N. E. 2d 43, 77 A.L.R. 2d 390 (1959) *on motion for reargument,* 6 N. Y. 2d 983, 191 N. Y. Supp. 2d 951, 161 N. E. 2d 736 (1959), *appeal dismissed* and *cert. den.,* 361 U. S. 374 (1960). Therefore, the constitutionality of limitations upon contingent fees is now so well established that the challenge to the contingent fee rule adopted by the Supreme Court of New Jersey is frivolous and insubstantial.

In addition to their substantive due process claims, the appellants also urged that the contingent fee rule denies equal protection of law by regulating contingent fee contracts in tort cases without imposing similar restrictions on contingency agreements alleged to exist in other areas of practice. The burden which a party must meet in challenging an economic regulatory measure on equal protection grounds is comparable to that governing substantive due process claims. As the Court stated in *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 489 (1955):

> "Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . . The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

Applying these principles to the present case, there can be no doubt as to the constitutionality of the Supreme Court of New Jersey establishing a schedule of maximum contingent fees in tort actions without imposing a similar requirement with respect to other areas of practice where contingent fee arrangements are allegely employed. First,

if the use of contingent fee arrangements in other areas were brought to the attention of the court, it might find that public policy would be offended by allowing any contingency arrangements at all. Secondly, contingency arrangements in other areas of practice may involve different considerations. The court might conclude, for example, that commercial enterprises which retain attorneys to do collection work have bargaining strength equal to that of the attorney and therefore do not require the protection of maximum fee schedules. Most importantly, tort actions comprise the largest area of civil litigation, vitally affecting not only litigants but also the public at large who must pay the costs of increased insurance premiums and court congestion requiring the appointment of more judges. It is also the area where the use of contingency arrangements is most well known. These factors lead to the clear conclusion that the Equal Protection Clause does not require every area in which a contingent fee might be permitted to be explored in order to decide that there must be appropriate regulation in the tort area.

The appellants also have attempted to assert the alleged constitutional right of potential clients to retain counsel as a basis for invalidation of the contingent fee rule. However, it is a firmly established principle of constitutional law that parties have standing to assert only constitutional rights which are personal to themselves. *Tileston* v. *Ullman,* 318 U. S. 44 (1943). This principle applies with particular force when a party seeks to assert the constitutional rights of others whose interests are inherently conflicting with his own in regard to the subject of the constitutional challenge. *See e.g. Erie R.R. Co.* v. *Williams* 233 U. S. 685 (1914) (employer lacks standing to challenge labor law on the grounds that the law deprives its employees of liberty without due process of

law); *Collins* v. *Texas,* 223 U. S. 288 (1912) (osteopath lacks standing to challenge medical licensing statute on the grounds that it denies the constitutional rights of the followers of Christian Science). Since the reason for the contingent fee rule is the protection of the public from the exaction of excessive legal fees by attorneys, the appellants do not have standing to assert the adverse interest of potential clients.

A further reason, intimately related to standing, why the Court should not entertain any challenge to the rule based on the alleged interests of potential clients is the well established principle that the federal courts will not entertain abstract, hypothetical attacks on the constitutionality of statutes. *Laird* v. *Tatum,* 408 U. S. 1 (1972); *Watson* v. *Buck,* 313 U. S. 387 (1941). It is difficult to imagine a more abstract and hypothetical constitutional claim than the appellants' allegation that the rule will deny members of the public access to court. There is no one before the court who claims that the rule has deprived him of the opportunity to file suit or to retain an attorney and, on any realistic analysis, it must be concluded that it is highly unlikely this will occur. It is highly improbable that the rule would ever prevent a member of the public from retaining an attorney on a contingent fee basis since, according to the appellants' own allegations, it does not affect the fees now normally charged on the first $50,000 of recovery (which under the rule may amount to $16,966), and it permits fees of 20% on the additional recovery from $50,000. to $100,000. and 10% on the recovery in excess of $100,000. If these rather generous maximums were to prove inadequate in a particular case, the attorney could of course apply for a greater fee pursuant to R. 1:21-7(f). The attempt to assert the hypothetical interests of unspecified members of the public is therefore completely lacking in substance.

The Trial Attorneys also urged before the district court that the assertion by the Supreme Court of New Jersey of the authority under the New Jersey Constitution to adopt the rule is plainly incorrect and therefore violates the Due Process Clause of the Fourteenth Amendment. This argument, however, is fundamentally inconsistent with the basic principle of our federal system that the interpretation of a state statute by a state's highest court is binding upon the federal courts including the Supreme Court of the United States. *Shuttleworth* v. *Birmingham,* 382 U. S. 87, 91 (1965); *N.A.A.C.P.* v. *Button,* 371 U. S. 415, 432 (1963). This is true no matter how strained the federal court may feel the state court's interpretation to be. As the Court said in *N.A.A.C.P.* v. *Button*:

> "For us, the words of Virginia's highest court are the words of the statute." 371 U. S. at 432.

In fact, the Court has expressly rejected the Trial Attorneys' argument that the Due Process Clause confers authority on the federal courts to review interpretations of state law by state courts:

> "Whether state statutes shall be construed one way or another is a state question, the final decision of which rests with the courts of the state. The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires; nor does it enable this court to revise the decisions of the state courts on questions of state law." *Hebert* v. *State of Louisiana,* 272 U. S. 312, 316 (1926).

Therefore, the Trial Attorneys' contention that the federal courts should construe the New Jersey Constitution to determine whether there is authority in state law for the adoption of the rule is plainly frivolous.

The appellants also urged before the district court that the rule is invalid because no trial-type hearing was held in advance of its adoption. However, this contention is plainly contrary to well-established authority holding that legislative measures, including the rules of administrative agencies, may be adopted without a hearing. See *e.g. Bowles* v. *Willingham*, 321 U. S. 503 (1944); *Pacific States Box and Basket Co.* v. *White*, 296 U. S. 176 (1935); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294 (1933); *Assigned Car Cases*, 274 U. S. 564, 583 (1927); *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U. S. 441 (1915); *Munn* v. *People of Illinois*, 94 U. S. 113 (1876). It should be added that any attorney who feels the schedule does not provide fair compensation in his particular situation may apply pursuant to R. 1:21-7(f) to have the court set a fee which is reasonable "in light of all the circumstances." It is the hearing on such an application, rather than the adoption of the rule, which properly may be analogized to a rate proceeding before a Public Utility Commission.

The appellants also claimed that the rule, insofar as it applies to contingent fee contracts entered into before it was adopted, impairs the obligation of contracts in violation of Article I, § 10 of the United States Constitution. To put the retroactivity claim in proper prospective, it should be noted that the rule does not represent the first instance where the state judiciary has regulated contingency arrangements. Contracts for contingent fees have always been subject to judicial disapproval. See *Hughes* v. *Eisner*, 14 N. J. Super. 58 (App. Div. 1951), *appeal dismissed* 8 N. J. 228 (1951); *Littlefield* v. *Kearns*, 5 N. J. Super. 68 (App. Div. 1949). The rule properly may be viewed, therefore, as simply a more efficient procedural mechanism for the discharge of a responsibility which

always has been reposed in the judiciary. Thus viewed, there can be no substantial argument that the rule impairs contracts in violation of constitutional principles, even assuming *arguendo* that such claims have not been mooted by the passage of time since the adoption of the rule. The Court has held, accordingly, that legislation limiting the compensation of attorneys in the prosecution of claims against the government is valid as to contracts which have been entered into before its passage. *Ball* v. *Halsell*, 161 U. S. 72, 82-84 (1896). In that case the Act limiting contingent fees was passed 17 years *after* the date the attorney entered into the fee contract and *after* he had performed important services under the contract. Similarly, in *Calhoun* v. *Massie*, *supra*, the Court held that the prohibition in the Omnibus Claims Act of 1915 against the "collection or receipt of any compensation in excess of 20%" applied to a contingent fee contract entered into before the date of its enactment. The insubstantiality of any claim of unconstitutionality as a result of retroactive application of the rule is further underscored by the fact that any attorney who claims the rule has operated unfairly as to him can challenge its retroactivity features in an application for the allowance of greater fees pursuant to R. 1:21-7(f).

The appellants further claimed before the district court that the rule, as applied to litigation in federal court, was invalid, because the regulation of legal fees in federal court has been pre-empted by federal statutes such as the Jones Act and Federal Employers Liability Act. However, this contention, even if meritorious, involves only an alleged conflict with federal statutes grounded in the Supremacy Clause, which does not confer jurisdiction on a three-judge court pursuant to 28 U.S.C. § 2281. *Swift & Company* v. *Wickham*, 382 U. S. 111 (1965). This contention, therefore, cannot be relied upon as a basis for the Court's jurisdiction to hear this appeal.

POINT II

The district court did not abuse its discretion in dismissing on grounds of abstention, because the delicate relationship between the parties and the undesirability of a lower federal court reviewing the regulation of the practice of law by a state supreme court are proper reasons for requiring the appellants to litigate their claims in state court.

Preliminarily, it is the position of the appellee that if a substantial constitutional question is presented, the three-judge court had jurisdiction under 28 U.S.C. § 2281 and hence the Court has jurisdiction of the appeal under 28 U.S.C. § 1253. It has long been clear that the applicability of the three-judge court requirement turns on the legislative character of state action, rather than the identity of the body which has adopted a legislative measure. The enactment of the predecessor of § 2281 in 1910 was a reaction to the then widespread resort by economic interests, such as railroads, to the injunctive power of the federal courts to impede the implementation of state economic regulations, including the rules of state administrative bodies such as Public Utility Commissions. Currie, *The Three-Judge District Court in Constitutional Litigation,* 32 U. of Chi. L. Rev. 1, 4-8 (1964). Thus, when a question arose as to whether the requirement for the convening of a three-judge court applied if a party sought to enjoin an order of a state administrative agency, as distinguished from an enactment of a state legislature, the law was amended to make this intention clear. 37 Stat. 1013 (1913). However, the Court later indicated that the amendment had been superfluous, since the original statute, while it did not expressly mention orders of administrative agencies, nevertheless covered them. *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290, 292 (1923).

The intention of § 2281 to provide a state with the protection afforded by three judges whenever the constitutionality of its legislative acts are drawn in question, irrespective of the particular body which has adopted the act, was reiterated twenty years later in *Phillips* v. *United States,* 312 U. S. 246 (1941) and *American Federation of Labor* v. *Watson,* 327 U. S. 582 (1946), where the Court found the predecessor to § 2281 to apply to an attack on the constitutionality of a State Constitution. In *American Federation of Labor* v. *Watson,* the Court said:

> "It would . . . be somewhat incongruous to hold that a single judge, while prohibited from enjoining action under an act of the state legislature, would be free to act if the state constitution alone were involved. The policy underlying § 266 admits no distinction between state action to enforce a constitutional provision and state action to enforce an act of the legislature. There is no suggestion in the history of § 266 that Congress was willing to give the federal courts a freer hand when state constitutional provisions were involved. In our view the word 'statute' in § 266 [the predecessor to § 2281] is a compendious summary of various enactments, by whatever method they may be adopted, to which a State gives her sanction and is at least sufficiently inclusive to embrace constitutional provisions." 327 U. S. at 592-593.

The rule adopted by the Supreme Court of New Jersey to regulate excessive contingent fees in tort actions is certainly the kind of legislative measure of general statewide application which § 2281 was designed to govern. The rule regulates fee arrangements between all members of the New Jersey Bar and any member of the public who

might someday seek to retain the services of a New Jersey attorney to bring a tort action. No one would question the applicability of § 2281 if a professional board within the executive branch of government were to enact a similar rule with regard to the profession it was charged with regulating and the constitutionality of the rule were challenged in federal court. Yet the regulation by the Supreme Court of New Jersey of the practice of law stands on a higher plateau than regulation by a state administrative agency, since the court, like the legislature, draws its regulatory power directly from the State Constitution, whereas a state agency only has such power as the legislature delegates to it. See *Law Students Civil Rights Research Council* v. *Wadmond*, 299 F. Supp. 117, 127-128 (S. D. N. Y. 1969) *aff'd* 401 U. S. 154 (1971), where Judge Friendly, speaking for the court, stated that an alternative grounds for convening a three-judge court was that a rule of general applicability adopted by a character committee acting under the supervision of the New York Appellate Division was a "statute" within the meaning of § 2281. See also *Lathrop* v. *Donohue, supra*, at 824-827. Furthermore, conflicts between the federal and state judiciaries are among the most sensitive in federal-state relations (*see Younger* v. *Harris*, 401 U. S. 37 (1971)), so the policies which underlie § 2281 are strongly implicated when the constitutionality of a rule adopted by a state's highest court is challenged in federal court. In fact, as the court below held, the area is so sensitive that even a three-judge court should seek to refrain from intruding into the regulation of the practice of law by a state supreme court. Therefore, to find § 2281 applicable where the constitutionality of a rule of a state agency is attacked but inapplicable where a rule has been adopted by a state supreme court pursuant to a direct grant of power under the State Constitution would be the same kind of "incongruous" result

which the Court construed § 2281 to avoid in *American Federation of Labor* v. *Watson, supra.* Therefore, if a substantial constitutional claim is presented, the Court has jurisdiction to review the decision of the district court to dismiss on grounds of abstention.

There are two important interests which are served by a federal court abstaining from deciding a matter raising federal constitutional questions and deferring instead to the state courts. First, by permitting the state courts to process the dispute, ". . . a federal constitutional issue . . . might be mooted or presented in a different posture by a state court determination of pertinent state law." *County of Allegheny* v. *Frank Mashuda Co.,* 360 U. S. 185, 189 (1959). Second, abstention is appropriate ". . . on grounds of comity with the states when the exercise of jurisdiction by the federal court would disrupt a state administrative process . . ., or otherwise create needless friction by unnecessarily enjoining state officials from executing domestic policies." Id.

In the first class of cases, where abstention is ordered solely to secure a state court determination on an issue of state law, the usual practice is for the federal court to stay proceedings pending adjudication by the state court. *Lake Carriers' Assoc.* v. *MacMullan,* 406 U. S. 498 (1972). There is no hard and fast rule that the federal court must retain jurisdiction in such cases, however, and on occasion dismissal has been ordered. See *e.g. Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368 (1949). In the second class of cases, where abstention is ordered to avoid interference with state activities, it is appropriate for the court to dismiss the action rather than to retain jurisdiction. *Alabama Public Service Comm.* v. *Southern Railway Co.,* 341 U. S. 341 (1951); *Burford* v. *Sun Oil Co.,* 319 U. S. 315 (1943). See also *Koehler* v. *Ogilvie,* 53 F.R.D. 98 (N. D.

Ill. 1971) *aff'd* 405 U. S. 906 (1972); *Urbano* v. *Board of Managers of New Jersey State Prison,* 415 F. 2d 247 (3rd Cir. 1969), cert. den. 397 U. S. 948 (1970); *Press* v. *Pasadena Independent School Dist.,* 326 F. Supp. 550 (S. D. Tex. 1971); Wright, *Federal Courts,* § 52, p. 200 (2d Ed. 1970).

The decision of the district court to abstain was based on both the presence of issues of state law, the resolution of which might obviate the need to rule on federal constitutional issue, and the undesirability of a lower federal court intruding into the delicate relationship which exists between members of the Bar and the state's highest court. A careful reading of the opinion leaves no doubt that the later consideration weighed heavily upon the court:

> "Essentially the case poses a dispute between a state's highest court and those persons authorized by that court to practice law in the state. The relationship between the parties thus is an extremely delicate one. Under such circumstances federal courts generally have considered it appropriate, before attempting any direct federal intervention at the outset, first to permit the state courts to process the dispute." (A2 to A3).

Where the grounds for abstention are in part the presence of an unresolved question of state law and in part the avoidance of the needless friction which might result from enjoining state officials from executing domestic policies, the case should be treated as the latter type and the appropriate disposition, as was ordered here, is dismissal. See *Koehler* v. *Ogilvie, supra; Barrett* v. *Atlantic Richfield Co.,* 444 F. 2d 38, 44-46 (5th Cir. 1971).

Assuming, in light of its denial of the motion to alter or amend the judgment, that the district court intended

the dismissal to be with prejudice, this disposition was a a sound exercise of discretion in view of the nature of the litigation. As the district court appropriately observed, the relationship between the members of the bar and the court responsible for regulating their professional conduct "is an extremely delicate one." It is also true, as seems to have been implicitly recognized by the district court, that the relationship between a state's supreme court and the lower federal judiciary, particularly with regard to the state court's regulation of the practice of law, is an extremely delicate one. See *Younger* v. *Harris, supra; Koehler* v. *Ogilvie, supra.* Furthermore, the determination that the entire controversy should be heard by the state courts in no way precludes the appellants from advancing any federal constitutional claims they may have, with the opportunity for ultimate review thereon by this Court. In fact, this has been the procedure generally followed in the leading cases involving challenges to the actions of state supreme courts in regulating the practice of law. See *e.g. Lathrop* v. *Donohue, supra; Cohen* v. *Hurley,* 366 U. S. 117 (1961). It is therefore submitted that it is appropriate within the federal judicial system for the Supreme Court of the United States, rather than any lower federal court, to review the actions of a state supreme court which deal with the regulation of the practice of law.

It is also significant in this particular case that the appellants challenge the constitutionality of the contingent fee rule on its face, rather than the manner in which it has been or might be administered. Therefore, the concern expressed by the Court in *England* v. *Louisiana Board of Medical Examiners,* 375 U. S. 411, 416 (1964) for a party's right to ". . . the benefit of a federal trial court's role in constructing a record and make fact find-

ings" does not seem applicable to this controversy. This case also involves the rather unusual circumstance that the appellants have advanced claims in state court nearly identical to those forming the basis of their federal action, except that the claims in state court are advanced not under the United States Constitution but rather under the parallel due process, equal protection and obligation of contract provisions of the New Jersey Constitution. By proceeding in this fashion, the appellants themselves have elected to litigate issues in state court comparable in scope to those which they claim the right to later re-litigate in federal court. This does not appear to be what was contemplated by the Court's opinion in *England* v. *Louisiana Board of Medical Examiners.*

For these reasons, the dismissal of the action by the federal district court was a sound exercise of discretion which does not warrant further review by the Court.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the appeal should be dismissed for lack of jurisdiction, the judgment of the three-judge court should be vacated and the matter should be remanded to the single federal district court judge. In the alternative, if the Court determines that a substantial constitutional claim is presented, it is respectfully submitted that the judgment of the district court dismissing the complaint on the ground of abstention should be affirmed.

Respectfully submitted,

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72-691

IN THE

Supreme Court of the United States

OCTOBER TERM 1972

Supreme Court, U. S.
FILED
DEC 6 1972
MICHAEL RODAK, JR., CLERK

No. 691

AMERICAN TRIAL LAWYERS ASSOCIATION, NEW JERSEY BRANCH, *et al.*, PHILIP G. AUERBACH, *et al.*,

Appellants,

v.

NEW JERSEY SUPREME COURT,

Appellee.

On Appeal From the United States District Court for the District of New Jersey

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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NEW JERSEY SUPREME COURT,

Appellee.

On Appeal From the United States District Court for the District of New Jersey

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

POINT I

On this record, appellee's claim that the court below was without jurisdiction because of the lack of a substantial question constitutes an attempt, impermissible in the posture of this case, to obtain from this Court summary adjudication, without briefs or argument, of the ultimate merits of the case.

Of course it is true that 28 U.S.C. § 2281 is inapplicable, and an appeal does not then lie to this Court under 28 U.S.C. § 1253, if the federal constitutional question presented is wholly without substance. But it can only be an extraordinary and utterly obvious case in which this Court, proceeding merely on the jurisdictional papers, will in effect overrule a lower court that did see briefs and hear argument, and hold that the question presented below so entirely lacks substance as to deprive federal courts of jurisdiction. It may be that the jurisdictional papers can give enough of the flavor of a case when the appeal is taken on the merits. In the instant case, the question presented on appeal and discussed in the Jurisdictional Statement does not concern the merits.

The extraordinary case in which dismissal may be ordered for lack of a substantial question is one unquestionably covered by prior or intervening decisions of this Court. That was the situation in *Bailey* v. *Patterson*, 369 U. S. 31 (1962). It was the situation also in *Turner* v. *City of Memphis*, 369 U. S. 350 (1962), but in that case this Court had received briefs on the merits and had heard argument. It was the situation as well in *Water Service Co.* v. *Redding*, 304 U. S. 252 (1938), which was disposed of summarily. But in *Redding* the court below had itself held that the question lacked substance because

it was identical with one adversely decided by this Court, and this Court affirmed. Compare *Gold* v. *DiCarlo,* 235 F. Supp. 817 (S. D. N. Y. 1964), decided on the merits by a three-judge court and affirmed by this Court, 380 U. S. 520 (1965).

No decision of this Court or of any other court so disposes of the questions presented on the merits of this case as to deprive a federal court of jurisdiction to decide them. Appellee's Brief in Support of Motion to Dismiss or Affirm offers a caricature of the contentions made below by appellants, which District Judge Barlow, who received briefs and heard argument on the merits deemed substantial, *Ex parte Porefsky,* 290 U. S. 30 (1933), and which the three-judge court, again on the basis of briefs and arguments, also found to be substantial, as appellee concedes, see Brief in Support of Motion to Dismiss or Affirm, at p. 6.

Appellee treats in a single paragraph, and misstates, what the court below called—and what in truth is—appellants' primary contention on the merits, concerning the authority of the Supreme Court of New Jersey to promulgate Rule 1:21-7(c). See Jurisdictional Statement, Appendix A, at p. 3(a). Appellants contended that Rule 1:21-7(c) is a "lawless exercise of authority," *Phillips* v. *United States,* 312 U. S. 246, 252 (1941); that it was based, not upon a dubious, erroneous, or even wholly implausible construction of the provisions of the New Jersey Constitution which are said to authorize it, but actually upon no claim of statutory or constitutional authority at all; and that for this reason Rule 1:21-7(c) violates Due Process as an arbitrary action, just as the judgment in *Thompson* v. *Louisville,* 362 U. S. 199 (1960), violated Due Process, not because it raised a question of "the suf-

ficiency of the evidence" (which would be equivalent to a question of erroneous construction), but because it rested "upon [no] evidence at all" (which is equivalent to the arbitrary action in this case).

No decision of this Court concludes this issue. Rather *Phillips* v. *United States, supra,* suggests its substantiality. And no decision of any other court concludes this issue. The State statutory and constitutional position was, of course, different in *Gair* v. *Peck,* 6 N. Y. 2d 97, 160 N. E. 2d 43 (1959), *appeal dismissed, cert. denied,* 361 U. S. 374 (1960), and the New York Court of Appeals construed the rule there involved as not making substantive law, but as merely supplying "a procedure for determining on the basis of the real facts whether a lawyer is subject to discipline," a procedure having "merely presumptive effect, like a burden of proof which pertains to procedure and is not substantive law." 6 N. Y. 2d at 104, 114, 160 N. E. 2d at 47, 53. New Jersey Rule 1:21-7(e), by contrast, declares that paragraph (c) of the Rule "is intended to fix maximum fees."

It is not necessary or appropriate in the present posture of the case to discuss at any length the other claims made by appellants below. It may be noted merely that *Yeiser* v. *Dysart,* 267 U. S. 540 (1925), and *Calhoun* v. *Massie,* 253 U. S. 170 (1920), do not in themselves govern other Due Process claims made by appellants, because these cases concerned the direct fixing of fees by the legislature in relation only to special statutory causes of action newly created by it. As to the necessity for a hearing if Rule 1:21-7(c) is regarded as an administrative rate-making order or an exercise of disciplinary power, appellants relied on such cases as *Southern Railway Co.* v. *Virginia,* 290 U. S. 190 (1933); and *Jordan* v. *American Eagle Fire Insurance,* 169 F. 2d 281 (D. C. Cir. 1948).

To be sure, a question may conceivably be deemed insubstantial in the jurisdictional sense even though not adversely covered by an applicable precedent (as the questions in this case are not), if it is, in appellee's word, frivolous—presumably on its face. But it is nothing short of indeed frivolous to contend, in the absence of applicable precedent, cf. *Bailey* v. *Patterson, supra,* that questions which a district judge found to be substantial on the basis of briefs and arguments, and which on a like basis a three-judge court found to be substantial, are so obviously and totally devoid of merit that this Court may so hold them without benefit of briefs and argument. Appellee's contention shows a marked lack of regard for the function and responsibility of the court below.

POINT II

On this record, appellee's claim that the court below was without jurisdiction because of the lack of a substantial question amounts to an impermissible attempt to appeal to this Court from the judgment in its favor which appellee obtained below.

Appellee moved in the court below "to dismiss the complaint for lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted." The court below granted the motion to dismiss, but did so on the ground of abstention. Appellee now moves in this Court for precisely the judgment of dismissal for lack of jurisdiction which it failed to obtain from the court below.

But appellee was the successful party below, even if not successful on the ground it would have preferred, and it cannot properly maintain an appeal. Yet that is exactly

what appellee is now attempting to do. This Court's holding in *Perez* v. *Ledesma,* 401 U. S. 82, n. 3 (1971) is precisely apposite: "The State successfully opposed an injunction . . . in the court below and now cannot appeal from its victory. See *Gunn* v. *University Committee to End the War in Viet Nam,* 399 U. S. 383, 391 (1970) (White, J., concurring)."

Respectfully submitted,

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Per Curiam

AMERICAN TRIAL LAWYERS ASSN., NEW JERSEY BRANCH, ET AL. *v.* NEW JERSEY SUPREME COURT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

No. 72-691. Decided January 15, 1973

In abstaining so as to permit a state court to pass on an issue of state law, a district court should retain jurisdiction pending the state proceeding so that appellants may preserve their right to litigate their federal claims in federal courts at the conclusion of the state proceeding.

Vacated and remanded.

PER CURIAM.

On December 21, 1971, the Supreme Court of New Jersey announced the adoption of Rule 1:21-7, effective January 31, 1972, establishing a graduated schedule of maximum contingent fees applicable to tort litigation conducted by New Jersey attorneys.[1] Appellants, representing members of the New Jersey bar, brought this action to enjoin the enforcement of the rules on the grounds that they violate several provisions of the Constitution, including the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The trial

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[1] Rule 1:21-7 provides in part:

"(c) In any matter where a client's claim for damages is based upon the alleged tortious conduct of another, including products liability claims, and the client is not a subrogee, an attorney shall not contract for, charge, or collect a contingent fee in excess of the following limits:

"(1) 50% on the first $1000 recovered;

"(2) 40% on the next $2000 recovered;

"(3) 33⅓% on the next $47,000 recovered;

"(4) 20% on the next $50,000 recovered;

"(5) 10% on any amount recovered over $100,000 . . . ."

judge convened a three-judge court. 28 U. S. C. § 2281.[2]

After hearing argument on the merits, the District Court pointed out that:

> "[E]ssentially the case poses a dispute between a state's highest court and those persons authorized by that court to practice law in the state. The relationship between the parties thus is an extremely delicate one. Under such circumstances federal courts generally have considered it appropriate, before attempting any direct federal intervention at the outset, first to permit the state courts to process the dispute. Cf. Reetz v. Bozanich, 397 U. S. 82, 85–87 (1970)."

The court added that "[a]s was true in *Reetz* the initial issue is whether the state constitution authorized the enactment challenged." The court therefore granted defendant-appellee's motion to dismiss.

By timely motion under Fed. Rule Civ. Proc. 59 (e), appellants sought an order amending the judgment by either

> "(A) Retaining jurisdiction, but staying proceedings in this Court pending determination of the issues of state law in the courts of New Jersey, or until efforts to obtain such a determination have been exhausted; or
>
> "(B) Ordering that the dismissal be without prejudice, so that the suits for determination of the

[2] Appellee maintained below, as it maintains before this Court, that a three-judge court need not have been convened because the constitutional question presented is insubstantial. *Bailey* v. *Patterson*, 369 U. S. 31 (1962). It insists, however, that if the claim is substantial then it must be heard by a court of three judges. 28 U. S. C. § 2281. In view of the posture of the case on this appeal, we do not, of course, express any view on the merits of the question presented.

federal constitutional issues may be reinstituted after exhausting state recourse with respect to state law issues." Jurisdictional Statement 10.

The motion was denied and appellants brought this appeal.[3]

"[A]bstention 'does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise.'" *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411, 416 (1964), quoting from *Harrison* v. *NAACP*, 360 U. S. 167, 177 (1959). For that reason, we have held that a dismissal on grounds of abstention so as to permit a state court to pass on an issue of state law must not be with prejudice. *Doud* v. *Hodge*, 350 U. S. 485 (1956); *Lake Carriers' Assn.* v. *MacMullan*, 406 U. S. 498 (1972). The proper course is for the District Court to retain jurisdiction pending the proceedings in the state courts. *Lake Carriers' Assn.* v. *MacMullan*, *supra*, at 512–513; *Zwickler* v. *Koota*, 389 U. S. 241, 244–245, n. 4 (1967).[4] Although the District Court may have intended its judgment of dismissal to be without prejudice to the right of appellants to litigate their federal claims in federal court at the conclusion of the state proceeding, the court did deny appellants' motion for an amendment to the judgment making clear that no prejudice would attach. The motion should have been granted. Accordingly, we vacate the judgment of the District Court and remand the case for proceedings consistent with this opinion.

So ordered.

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[3] The validity of the District Court's decision to abstain is not at issue on this appeal.

[4] "It is better practice, in a case raising a federal constitutional or statutory claim [where the doctrine of abstention is applied], to retain jurisdiction, rather than to dismiss . . . ." *Zwickler*, *supra*, at 244 n. 4.